# The Procedures of Notice-and-Comment Rulemaking

# Learning Objectives for this Module

## Learn the basic requirements for notice and comment rulemaking.

## Learn when you can supplement the record for rulemaking.

## Learn how to manage ex parte contacts in rulemaking.

## Learn that the statutory framework for rulemaking preempts additional judicial procedural requirements.

## Learn the basic structure of the framework for executive branch review of rulemaking.

# Reading Assignment

## Chapter 5, 179-195

# Issues to be addressed

## Parse the requirements of 553 on notice and comment

### <http://www.archives.gov/federal-register/laws/administrative-procedure/553.html>

### As we will see in the later chapter on judicial review, the courts have required that rules be supported by very extensive documentation and legal memorandum, detail far beyond what was anticipated by the drafters of the APA.

## The Logical Outgrowth Test

### Chocolate Manufacturers Ass’n v. Block, 755 F.2d 1098 (4th Cir. 1985)

#### HHS notices a proposed rule about restricting sugar in cereal that is approved for the WIC program.

#### The final rule banned flavored milk products from the program.

#### What was the CMA's claim that the notice for rule was ineffective?

##### Does the final rule have to be the same as the proposed rule?

##### Can the agency defend by saying that flavored milk was brought up in the comments?

##### Why are the comments not part of the notice?

#### What is the logical outgrowth test?

##### How would you use it in this case?

##### What did the court order the agency to do to cure the problem in this case?

##### What should CMA do if a new proposed rule includes them?

#### Limits on Logical Outgrowth - Arizona Public Service Co. v. E.P.A.

##### The EPA proposed letting Native American tribes implement CAA regulations on their sovereign territory.

###### Comparable state plans are subject to judicial review.

###### Why did the tribes object to this in comments?

##### The final rule does not include judicial review of the tribes regulations.

###### How did plaintiffs argue that this was not a logical extension?

###### What did the court say plaintiffs should have been aware of?

###### How would you explain this as the agency defending a rule?

## Publishing Legislative Rules that do not need Notice and Comment

### <http://biotech.law.lsu.edu/Courses/study_aids/adlaw/552_update.HTM>

#### See (D)

### What if the agency does not publish the document in the FR, but puts it on the Internet? (Which has become very common.)

#### “Except to the extent that a person has actual and timely notice of the terms thereof...”

## Supplementing the Record (not in the book)

### Rybachek v EPA, 904 F.2d 1276 (1990)

#### Gold mining under the CWA.

#### In a dubious reincarnation of the 1890's world of Yukon poet Robert Service, we deal here a century later with “strange things done in the midnight sun by the men who moil for gold.”, quoting The Cremation of Sam McGee

#### EPA added 6000 pages of supporting info when responding to comments

#### The agency may supplement the rulemaking record in response to comments asking for explanation.

### Idaho Farm Bureau Federation v. Babbitt, 58 F.3d 1392 (9th Cir. 1995)

#### Endangered Species Act listing.

#### Agency added a report to the record when it replied to comments, then relied on it in the final rule.

#### The agency may not add new material and then rely on it without given an opportunity to comment on it.

## Negotiated Rulemaking and Notice and Comment

### The negotiation happens before the rule is proposed in the FR.

### The standards for publication and notice are the same as for all other notice and comment rules.

### This solves any ex parte contacts problem because the rule must be fully justified by its published record.

### Interested parties can still comment.

## Ex Parte Communications

### Bias and Prejudice

#### How does the notice provision in rulemaking change the issues in ex parte communications?

#### Why aren’t ex parte communications before the promulgation of the rule a problem?

#### When could ex parte communications be an issue?

##### How can you cure this?

##### The key is whether the published record supports the rule.

### Sangamon Valley Television Corp. v. U. S., 269 F.2d 221 (D.C. Cir. 1959)

#### This is an old case.

#### While it is a rulemaking on allocation of the electronic magnetic spectrum, it really resembles an old ratemaking because it involves a very small number of identified parties. It might better be seen as an adjudication.

#### There were ex parte contacts, which were not on the record, and the court found this a problem.

### Association of National Advertisers , Inc. v. FTC, 627 F.2d 1151 (D.C. Cir. 1979)

#### FTC is adopting rules on TV advertising directed at children.

##### Chairman has written and spoken at length on the evils of TV ads aimed at children

##### Plaintiffs seek to disqualify him because of bias

#### Court held that plaintiffs must show clear and convincing evidence that he has an unalterably closed mind on matters critical to the rulemaking

#### No rulemaking has ever been overturned on the basis that a decisionmaker was unlawfully prejudiced.

### DC Federation of Civic Associations v. Volpe, 459 F.2d 1231 (D.C. Cir. 1971)

#### (not a rulemaking)

#### Congress pressures DOT to build a bridge in DC.

##### Plaintiffs claim that the Secretary gave in to the pressure from Congress.

#### The Volpe test

##### 1) was there specific pressure on the agency to consider improper factors?

##### 2) did the agency in fact change its mind because of these considerations?

#### How can the agency defend itself from a Volpe attack?

##### After Overton Park, this can be better seen as a case where the Secretary did not properly document his decisionmaking in the record.

### Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981)

#### Rulemaking on coal fired power plants

##### Why is this controversial then and more so now?

#### Plaintiffs claimed that the president influenced the agency decision after the comment period.

##### Is that wrong?

#### Senator Bird also weighed in

#### What do plaintiffs need to show to establish undue influence?

##### Why is the outcome test, combined with the record, a good solution?

### What is the President's Role in Rulemaking? (not independent agencies)

#### Controls and supervises executive branch decisionmaking

##### What just happened with the ozone regs?

##### How is the role different in adjudications?

#### When should the president's contacts be documented?

##### When the statute requires that they be docketed

##### If the rule is based on factual information that comes from such a meeting.

## Should State Rules Differ from Federal Rules on Notice and Comment?

### Limited staff

#### Greater reliance on the expertise of board members, rather than staff

#### Board may hear lots of testimony and review a lot of info - they cannot afford the time and effort to put together volumes of supporting info for regs

#### What about LA's 300+ tiny boards?

### Should state agencies have a reduced publication requirement?

### Should they be able to publish rules without explanation and only have to explain if asked?

## Congressional Mandates (Hybrid Rulemaking) at the FTC

### issue an advance notice of proposed rulemaking, which describes the area of inquiry under consideration and invites comments from interested parties;

### send the advance notice and, 30 days before its publication, the notice of proposed rulemaking to certain House and Senate committees;

### hold a hearing presided over by a hearing officer at which persons may make oral presentations and in certain circumstances to conduct cross-examination of persons;

### include a statement of basis and purpose to address certain specified concerns;

### and conduct a regulatory analysis of both the proposed and final rules that describes the proposal and alternatives that would achieve the same goal and analyzes the costs and benefits of the proposal and the alternatives.

## Constitutional and Other Judicially Created Procedural Requirements

### Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978).

#### Nuclear power plants at this time had to get a building permit, which is an adjudication, and once the plant was constructed, an operating permit, which involved another adjudication. The law allowed public participation and environmental groups used litigation to delay the issuance of the permits. One of the most contentious issues was the disposal of nuclear waste. Under NEPA, the National Environmental Protection Act, the agency had to explain how the waste would be handled so that it would not harm the environment. The problem was that no knew what to do about it, and we still do not. So operating permits could be delayed for years fighting over this.

#### The NRC (Nuclear Regulatory Commission) issued a rule saying that it was OK to store the waste until the waste disposal process was solved in the future. (We are still waiting.) This rule then meant that there were no factual issues left about waste disposal in the permit hearing. The court was not happy, since the rule effectively said we get to ignore this problem. The lower court ordered more procedure for the rulemaking, beyond what was required by the licensing law and the APA:

##### “The court then examined the rulemaking proceedings and, despite the fact that it appeared that the agency employed all the procedures required by 5 U. S. C. 553 (1976 ed.) and more, the court determined the proceedings to be inadequate and overturned the rule.”

#### The United States Supreme Court ruled that the APA and applicable statutes preempted the court’s power to add additional procedures unless the process was constitutionally deficient without those procedures. Thus the courts were no longer able to modify the procedures for rulemaking.

### This leaves open the question of whether there are any due process rights in rule making. There are exceptions for military and foreign affairs matters, but those get special constitutional latitude in every context. But it is hard to see why agencies could not be empowered to make rules without any notice and comment, in the same way that legislatures can make laws without public participation.

## Executive Orders Regulating Rulemaking

### What is the president's authority over rulemaking?

### What about for independent agencies?

### Why should the president exercises authority over rulemaking?

#### Coordination of agencies?

#### Assuring that the agencies carry out the administration's objectives?

### Does an executive order create private rights, i.e., can you challenge an agency's OIRA showing in court?

### Acronyms

#### OMB - Office of Management and Budget

#### OIRA - Office of Information and Regulatory Affairs

### Executives Orders on Rulemaking

#### E.O. 12630—Governmental Actions and Interference with Constitutionally Protected Property Rights—Requires agencies when they issue rules with significant takings implications to discuss and identify the takings issues in their submissions to OMB.

#### E.O. 12898—Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations—Requires agencies when practicable and appropriate to translate public documents relating to human health or the environment for limited- English-speaking populations.

#### E.O. 12988—Civil Justice Reform—Requires agencies to review any rules they issue to assure that they do not unduly burden the federal court system.

#### E.O. 13045—Protection of Children from Environmental Health Risks and Safety Risks—Requires agencies when they issue economically significant rules that concern health or safety risks that may disproportionately affect children to evaluate specifically the environmental or safety effects of the regulation and to explain why the planned rule is preferable to other alternatives.

#### E.O. 13132—Federalism—Requires agencies when they issue rules that impose substantial costs on state and local governments to consult with state and local officials early in the process and to publish in the preamble a description of the agency’s consultation, the nature of their concerns, the need for the rule, and the extent to which the officials’ concerns have been met.

#### E.O. 13175—Consultation and Coordination with Indian Tribal Governments—Requires agencies to coordinate and consult with Indian tribes when they issue rules that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

#### E.O. 13211—Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use—Requires agencies to prepare a Statement of Energy Effects with regard to significant regulatory actions that are either likely to have a significant adverse effect on the supply, distribution, or use of energy or designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action.

#### E.O. 13272—Proper Consideration of Small Entities in Agency Rulemaking—Requires agencies to provide draft rules to the Chief Counsel for Advocacy in the Small Business Administration and to give ‘‘every appropriate consideration’’ to the Chief Counsel’s comments.

### E.O. 13563—Improving Regulation and Regulatory Review— Elaborates five new principles to guide regulatory decisionmaking.

#### First, agencies are directed to promote public participation, in part through making relevant documents available on regulations.gov to promote transparency and comment. It also directs agencies to engage the public, including affected stakeholders, before rulemaking is initiated.

#### Second, agencies are directed to attempt to reduce ‘‘redundant, inconsistent, or overlapping requirements,’’ in part by working with one another to simplify and harmonize rules.

#### Third, agencies are directed to identify and consider flexible approaches to regulatory problems, including warnings and disclosure requirements. Such approaches may ‘‘reduce burdens and maintain flexibility and freedom of choice for the public.’’

#### Fourth, agencies are directed to promote scientific integrity.

#### Fifth, and finally, agencies are directed to produce plans to engage in retrospective analysis of existing significant regulations to determine whether they should be modified, streamlined, expanded, or repealed.

### The Big One - Executive Order 12866

#### What triggers review?

##### OIRA must review rules that have an impact of more than 100M aggregate or substantial impact on a segment of the economy or anything else.

#### The Regulatory Philosophy

##### Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people. In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating.

#### CBA under 12866

##### Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider.

#### Choosing Among Alternatives

##### Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.

##### Pretty simple? :-)

#### What must the agency provide OIRA - I

##### An assessment, including the underlying analysis, of benefits anticipated from the regulatory action (such as, but not limited to, the promotion of the efficient functioning of the economy and private markets, the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination or bias) together with, to the extent feasible, a quantification of those benefits;

##### An assessment, including the underlying analysis, of costs anticipated from the regulatory action (such as, but not limited to, the direct cost both to the government in administering the regulation and to businesses and others in complying with the regulation, and any adverse effects on the efficient functioning of the economy, private markets (including productivity, employment, and competitiveness), health, safety, and the natural environment), together with, to the extent feasible, a quantification of those costs;

##### An assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, identified by the agencies or the public (including improving the current regulation and reasonably viable nonregulatory actions), and an explanation why the planned regulatory action is preferable to the identified potential alternatives.

### How do these CBA and Review Requirements Affect Agencies?

#### Small businesses

##### Why is there a special provision for analyzing impact on small businesses?

##### How would you argue for this special consideration as a small business lawyer?

##### How would your view of this special treatment change if you were a consumer affairs or environmental lawyer?

#### What are the effects on the agency?

##### Fewer rules?

##### Better documented rules?

##### Less regulation?

##### More danger to the public?

#### Who benefits?

#### Who loses?

#### What is the financial impact?

### Statutory Requirements

#### National Environmental Policy Act (NEPA) imposes requirements if the rule affects the environment

#### Regulatory Flexibility Act - small business

##### Only direct effect on small business

##### Rules on small truck standards might affect small business owners, but since it is directed at manufacturers, small business owners do not have standing

#### Paperwork Reduction act - every rule that requires reporting must be reviewed

##### CDC newsletter cannot ask for reader feedback

#### Statutory requirements can create private rights

#### Information Quality Act

##### Requires OMB to adopt guidelines ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies

##### Why is this a redundant requirement?

##### What could be the purpose of this requirement?

#### Unfunded Mandates

##### Unfunded Mandates Act of 1995 - Agency must do a CBA if the costs exceed 100M

###### What is an unfunded mandate?

##### What would be the impact of banning unfunded mandates?

##### What are the types and impact of unfunded mandates on public schools?

### Congressional Review

#### Most rules, including those exempt from notice and comment, must be reported to Congress, which has 60 days to review them

##### This was at issue in the GAO opinion

##### There is a provision for emergency rules

#### What can Congress do if it does not like the rule?

##### When is this likely to happen?

##### What about independent agencies?

#### Why does this law not violate separation of powers?

# Evaluation Questions

## Informal (notice and comment) Rulemaking

### What are the requirements for notice and comment (informal) rulemaking?

#### What has to be published in the register?

#### What does the agency have to do with the comments?

#### Why can’t the record in rulemaking be supplemented in most cases when the rule is challenged in court?

##### When can it be supplemented?

### When does the APA allow legislative rules to be made without notice and comment? (Exclude formal rulemaking.)

#### What are the options for getting comments for emergency rules?

### What are the requirements for proving proper notice of the contents of a rule?

#### Be specific, using *Chocolate Manufacturers Ass'n v. Block* as an example

##### Can the agency successfully claim that comments taken during notice and comment provide notice to other parties about potential changes in the final rule?

#### How was this modified by *Arizona Public Service*?

##### What was at issue in the case?

##### Why should parties have been aware of the potential modification of the final rule?

### How does the notice provision in rulemaking change the issues in ex parte communications as compared to adjudications or Article III trials?

#### How does the notice requirement eliminate the ex parte communications issues for communications before the promulgation of the rule?

#### When are *ex parte* communications an issue in rulemaking?

#### Discuss the limitations on *ex parte* communications and political influence in rulemaking.

##### What was the issue in *Volpe* and how was the ex parte issue resolved on appeal?

#### Are contacts with the President *ex parte* contacts?

##### Are they improper?

##### How did the court resolve the issue in *Sierra Club v. Costle*?

##### What if the contacts are with an independent agency?

### How are the problems of bias and prejudice different in rulemaking as opposed to adjudications?

#### What is the standard for disqualifying the secretary for bias in rulemaking?

#### Is this likely to happen?

### Constitutional rights in rulemaking

#### What did Vermont Yankee tell us about the power of courts to change the procedures for rulemaking?

#### How would you argue that there is no constitutional right to public participation in rulemaking?

## Executive Review of Rulemaking

### In broad terms, what does Executive Order 12866 require an agency to consider when making rules?

### What is OIRA?

#### What is its role in rulemaking?

#### Which agencies is it able to control?

#### Which agencies are beyond its control and why?

### Why are there different standards for reviewing rules that affect small businesses?

#### What are the problems with this special concern for small business from a consumer/individual citizen’s point of view?

### After *Chadha* eliminated the legislative veto, how did Congress assure it would have advance notice of new rules?

#### What must it do if it wants to legally (as opposed to politically) block or change a new rule?

### What is an unfunded mandate?

#### Why are these politically controversial?

#### What are examples?

#### Could the government function if it had to pay for all the costs of complying with regulations?

#### Where would that money have to come from?